United States General Accounting Office

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Report to the Chairman, Committee on Governmental Affairs, U.S. Senate

January 1991

REGULATORY FLEXIBILITY ACT

Inherent Weaknesses May Limit Its Usefulness for Small Governments

GAO/HRD-91-16

GAO

United States
General Accounting Office
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Human Resources Division

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January 11, 1991

The Honorable John Glenn
Chairman, Committee on
Governmental Affairs
United States Senate

Dear Mr. Chairman:

This report responds to your July 26, 1989, letter expressing concern that federal agencies are not sufficiently analyzing the impacts of their proposed regulations on small governments (under 50,000 population). You further indicated concern that the goal of the Regulatory Flexibility Act of 1980 (Reg Flex)—to reduce regulatory burdens on small businesses, small governments, and nonprofit organizations—is not being met for small governments.

Reg Flex requires federal agencies to analyze the effects of proposed regulations on small entities. It also requires agencies to identify alternatives that would achieve the same purpose but place less burden on these entities. Oversight hearings before your Committee in 1988 suggested that the goal of reducing the burden for small governments is not being met. You introduced the Small Governments Regulatory Partnership Act (S. 1758) in October 1989 to address this concern. S. 1758 proposed to improve the implementation of Reg Flex as it applies to small government by (1) creating an Office for Small Government Advocacy in the Office of Management and Budget (OMB), (2) requiring rule-making agencies to develop data banks to measure the impacts of proposed regulations on small governments, and (3) requiring a cumulative inventory of regulations affecting small governments. Although it was not considered during the 101st Congress, we understand your Committee expects to further consider this matter in the 102nd Congress. This report is intended to assist your deliberations on this issue.

Results in Brief

Federal agencies are not conducting as many Reg Flex analyses for small governments as they might, largely because of weaknesses in the act. First, the act designates the Small Business Administration (SBA) as the monitoring agency, but SBA currently lacks staff with expertise in small government issues to monitor agency compliance with the act. Second, the act does not provide a mechanism to ensure that federal rule-making agencies comply with the act. And third, neither the act nor SBA provides sufficiently specific criteria or definitions to guide rule-making agencies in deciding whether and how to assess the impact of proposed

regulations on small governments. While SBA can address some of these problems, it has not over the past decade. Further, we believe that the approach envisioned under S. 1758 would not address these weaknesses.

We believe SBA should develop the expertise needed to better implement provisions relating to small governments. We also believe that, if the Congress wishes to strengthen the implementation of Reg Flex, it should consider amending the act to require SBA, in consultation with OMB, to develop criteria as to whether and how federal agencies should conduct Reg Flex analyses for small governments. It should also consider expanding SBA's existing authority to review and comment on proposed agency regulations affecting small governments. This expansion should direct SBA to work with OMB to ensure agency compliance with the provisions of the act.

Background

In 1980, when considering the need for Reg Flex, the Congress found, in part, that

- uniform federal regulatory and reporting requirements had often imposed unnecessary and disproportionately burdensome demands on small governments with limited resources and
- alternative regulatory approaches, which do not conflict with stated objectives or applicable statutes, may be available to reduce the significant economic impact of regulations on small governments.

Reg Flex attempts to address these concerns in two ways. First, it requires federal agencies to analyze the effects of proposed regulations. And second, it requires agencies to identify alternatives that would achieve the same purpose but place less burden on small entities. Appendix I describes in more detail the purpose of the act; how it is intended to operate; and how it fits into the larger, overall federal effort to minimize the burden of federal regulations.

Oversight hearings before your Committee in 1988 suggested that the goal of reducing the burden for small governments is not being met. During these hearings, witnesses complained that federal rule-making agencies were not sufficiently analyzing regulations for compliance with Reg Flex. The National Association of Towns and Townships (NATaT) believed that the agencies often, as a matter of course, certified that proposed regulations had no significant impacts and, therefore, did not assess their potential impacts on small governments.

These hearings led your Committee to three conclusions. First, the act had assigned oversight responsibilities to SBA—an agency that has little expertise in the area of small governments. Second, statutory language allows federal agencies to bypass conducting Reg Flex analyses. And third, federal agencies lacked reliable data to assess regulatory effects on small governments. You introduced S. 1758 in October 1989 to address these concerns.

Objectives, Scope, and Methodology

To assist your deliberations on this issue, you asked us to

- determine if federal agencies were doing Reg Flex analyses in appropriate cases;
- identify problems with the implementation of the act;
- determine the availability of data that federal agencies need to assess regulatory impacts on small governments; and
- determine the feasibility of developing a comprehensive, cumulative inventory of federal regulations that mandate actions by small governments.

To do this, we examined six regulatory actions taken by four federal rule-making agencies—Environmental Protection Agency (EPA), Department of Labor, Federal Communications Commission (FCC), and Department of Transportation (DOT)—that were likely to have significance for small governments. We assessed how these agencies implemented Reg Flex and how they prepared their analyses. We also discussed with agency officials the problems they may have had in carrying out the act. Appendix II contains the scope and methodology, which explains how and why we selected these regulatory actions and agencies.

This report addresses only the small government sector, which the act defines as any town, village, city, county, school district, or special district with a population under 50,000. About 97 percent of all governments in the United States met this population criterion.

Federal Agencies Conduct Few Reg Flex Analyses for Small Governments

Adequate criteria have not been developed for determining whether and how Reg Flex analyses should be done. Therefore, we were unable to determine whether federal rule-making agencies were doing Reg Flex analyses when appropriate. For example, the act allows agencies to interpret when they believe their proposed regulations affect small governments, and when they should conduct an analysis. In our review of the rule-making processes in several agencies, we noted that federal

rule-making agencies identified few of their proposed regulatory actions as affecting small governments. They also judged even fewer to be significant enough to warrant a Reg Flex analysis. As a major interest group representing small governments, NATaT believes that agencies should have done more Reg Flex analyses, and cited 14 instances. While we could not verify its conclusions because of the lack of criteria, we believe some of these instances may have warranted further analysis under Reg Flex.

For the 18-month period between April 1988 and September 1989, OMB's Unified Agenda of Federal Regulations reported that federal agencies viewed less than 3 percent (336 out of 12,207) of all regulatory actions as affecting small governments. For these actions, we could not determine the number of Reg Flex analyses conducted because agencies do not keep records of this information. During this period, the four agencies we reviewed identified only three actions as having a significant enough effect on small governments to warrant an analysis. Agencies, however, did not propose alternatives to reduce the burden of any of these three actions.

In testimony before your Committee in 1988, NATaT said federal agencies were not doing enough analyses. NATaT identified 14 cases between 1985 and 1987 that it believed warranted a Reg Flex analysis or, at least, warranted an explanation about why rule-making agencies did not conduct an analysis. These cases included instances in which (1) agencies did not prepare a Reg Flex analysis, (2) the Reg Flex analysis addressed only small businesses and not small governments, or (3) the analysis, in NATaT's view, underestimated the effects on small governments. While we could not support NATaT's conclusions because we believe adequate criteria do not exist for making such judgments, we believe that several of the cases NATaT highlighted may have warranted further analysis by the sponsoring agencies.

Problems With Implementing the Act

The act has three inherent weaknesses that help explain why agencies prepare few Reg Flex analyses—and why they develop few burden-reducing alternatives for small governments. First, the act designates SBA to monitor agency compliance with the act, but SBA lacks inherent expertise in focusing on small government concerns. Second, the act does not provide a mechanism to ensure that agencies comply with the act's provisions. And third, neither the act nor SBA provides sufficiently specific criteria or definitions to guide rule-making agencies in deciding whether and how to assess the impact of a proposed regulation. As a

result, each agency has developed its own definition of "significant impact," which triggers the requirement to prepare a Reg Flex analysis, and has determined the methods to be used when conducting such an analysis.

SBA Lacks Expertise in Small Government Issues

The act designates SBA's Chief Counsel for Advocacy to monitor federal agency compliance with the act's provisions. However, SBA's mission is to help small businesses and it has not had a direct interest in the role or problems of small governments. While it has occasionally commented on proposed rules on behalf of small governments, SBA officials told us that their staff's limited knowledge of small government issues adversely affects their monitoring capabilities. Therefore, SBA has difficulty in determining whether each agency's rationale for not conducting a Reg Flex analysis for small governments is valid.

During the 1988 congressional hearings on the implementation of Reg Flex, the Chief Counsel testified that, when Reg Flex was introduced, the provisions were intended to only apply to small businesses. However, the bill was later amended to include small government jurisdictions. By placing the monitoring and reporting function for small governments in SBA, he observed, the Congress may have unintentionally signaled that Reg Flex's emphasis should be the small business perspective.

S. 1758 attempted to address this concern by lodging responsibility in OMB for monitoring the act's provisions for small governments. This legislation would have established an Office for Small Government Advocacy within OMB to serve as a focal point for comments on regulations that affect small government. The office's duties would include monitoring the costs and burdens of such regulations, proposing ways of reducing burdens, and monitoring agency compliance with Reg Flex. However, both SBA and OMB expressed reservations about splitting the monitoring functions between SBA for small business and OMB for small government. Both agreed the small government monitoring responsibility required an organization with expertise in small government issues to enable it to serve as an effective advocate for that entity. However, OMB officials viewed their mission as overseeing all federal agency activity, not advocating for any particular interest.

SBA Lacks Authority to Compel Compliance

Reg Flex neither explicitly requires SBA to interpret or provide guidance on implementing statutory language in the act nor authorizes SBA to compel rule-making agencies to comply with the act's provisions. Further, the act specifically notes that rule-making agency actions (or lack of action) are not subject to direct judicial review.

The act requires federal rule-making agencies to submit Reg Flex analyses and regulatory agendas to SBA for review. SBA also reviews all regulatory actions reported in the Federal Register. SBA may provide formal and informal comments to agencies. Occasionally, SBA contracts for additional analyses of agency actions. The act also requires SBA's Office of the Chief Counsel for Advocacy to monitor agency compliance with its provisions and report annually to the President and the Congress. If, however, agencies do not comply with the act, SBA has no authority to compel compliance.

Additional Guidance Needed to Define Key Terms

The act requires agencies to prepare a Reg Flex analysis when any proposed rule is likely to have a significant economic impact on a substantial number of small governments. However, the act does not define such terms as "significant economic impact" or "substantial number," which trigger the requirement to prepare a Reg Flex analysis, nor does it specify the methods agencies should use when conducting such an analysis. In addition, Reg Flex does not require SBA to develop criteria for agencies to follow. By requiring SBA to monitor compliance with the act's provisions, the act presumably gives SBA authority and discretion to at least provide guidance to agencies on what triggers an analysis, and how it should be done. However, SBA has not done so.

In 1981, SBA issued guidance to federal rule-making agencies on how to implement Reg Flex. This guidance offered general principles but did not attempt to define terms in the act. As a result, each rule-making agency has the discretion to interpret the statute. Of the four agencies we reviewed, each has a different interpretation. For example, EPA has written guidance that defines criteria for determining "significant economic impact" based on compliance and capital costs as a percentage of total costs. In addition, EPA requires its analyses of regulatory alternatives to include the costs and the effects on the United States' ability to compete in the marketplace. In contrast, Labor lacked internal guidance. When preparing the Reg Flex analysis for the proposed Fair Labor Standards Act (FLSA) regulations, Labor based both its criteria for determining significant impact and its analytical requirements on an SBA pamphlet, which describes Reg Flex in lay terms.

In their regulatory development process, the four agencies we reviewed concluded that the impacts of five of the six regulations we studied were "not significant" for small governments.[1] In two of these five cases, the agencies did not conduct a Reg Flex analysis. In both of these cases, NATaT believed agencies should have done an analysis. For example, when EPA developed its underground storage tank insurance requirements, its Reg Flex assessment did not separately identify their effects on small governments. And, in the sixth case, Labor did not separately identify the costs to small governments in its analysis of the FLSA regulations. As a result, NATaT felt Labor understated the impact of these regulations.

In contrast to Reg Flex analyses, the regulatory impact analyses required by Executive Order (E.O.) 12291[2] — which are similar to Reg Flex analyses—are explicitly defined with respect to whether and how the analyses should be done.[3] In addition, E.O. 12291 gives OMB the opportunity to better ensure agency compliance by allowing it to comment on an agency's proposed rule. The agency is then required to respond to OMB's comments and refrain from publishing its final rule to the extent permitted by statutory or judicial deadlines. We found that when E.O. 12291 requires agencies to prepare regulatory impact analyses, they use these analyses as a vehicle for their Reg Flex analyses. We did not identify any cases when agencies prepared a Reg Flex analysis independent of OMB's regulatory impact analysis.

Limited Availability of Data Does Not Constrain Reg Flex Analyses

In response to interest group concerns about the lack of data on small governments, S. 1758 would have required federal rule-making agencies to develop "data banks" on them. These data banks would contain information collected by each federal agency relating to the impact of individual regulations on small governments. Most federal agencies we reviewed do not maintain regulatory impact data on small governments. But this has not limited their ability to make decisions on whether to conduct Reg Flex analyses. We also found that the types of data needed

[1]Labor did not quantify costs for small governments; it concluded that the application of FLSA would have a significant impact on small governments, but its Reg Flex analysis did not identify any alternatives to reduce burden on small governments because it believed the amendments to FLSA left it no options.

[2]See app. I for a description of the executive order.

[3]See, for example, the section on "Regulatory Policy Guidelines," in OMB's Regulatory Program of the United States Government, April 1, 1988-March 31, 1989.

to conduct such analyses tend to be unique to a specific rule-making proceeding.

Three of the four agencies did not collect data on an ongoing basis to determine regulatory impacts on small governments. Instead, they used a variety of approaches to decide whether their proposed regulations were significant enough to do Reg Flex analyses. These approaches range from formal and informal public comments to extensive data analysis to identify costs and effects on various types of small governments. When agencies used quantitative data to determine the effects of their proposed regulations on small governments, they commonly relied on data from special studies done in connection with other, broader, regulatory analyses required by OMB.

S. 1758 would have required federal agencies to use uniform data collection standards to create data banks that could be used to measure the impacts of proposed regulations on small governments. Doing this may not be practical for several reasons. First, the diversity in the way local governments are organized greatly complicates establishing comparable data. For example, in the case of EPA's regulation of water quality standards, obtaining information on the number and diverse types of water systems operated by small governments would most likely not provide a basis for comparing the regulatory impact of the standards between the governments. Some water systems serve two or more counties, whereas others serve a single county with several small jurisdictions. Uniform data standards cannot easily account for such variations. Second, agencies generally collect data tailored to address a specific regulatory concern, limiting the data's usefulness for other purposes. For example, EPA's Office of Drinking Water collects information on public and private water systems. But it does not collect information on the costs of operating drinking water treatment plants by small local governments. For these reasons, agency data banks may not provide much more information for assessing the impacts of proposed regulations on small governments than what is already available through the Bureau of the Census. Census's Division of Government collects financial, personnel, and services data from all small governments every 5 years.

Inventorying Actions With Impacts on Small Governments

S. 1758 would also have required OMB to prepare an annual report that would include an inventory of the cumulative effects of federal regulations on small governments. Several factors, however, limit the practicality and usefulness of an inventory.

Information for an inventory of regulatory effects on small governments would mainly come from agencies' Reg Flex assessments. But, because of the lack of criteria, agencies may not identify and assess all regulations that have significant impacts on small governments.

Also, even if all agencies had criteria and diligently assessed all regulations with significant impacts on small government, it may not be possible to convert these impacts into common measures so a cumulative impact can be measured. For example, it may not be possible to assess the cumulative effect of increased village responsibilities to monitor storm sewer water quality by testing for 77 different chemical pollutants, alongside identifying asbestos hazards in local schools. First, the boundaries of the village and school district may not necessarily be coterminous. And second, a dollar measure may not always be appropriate because the village or school district response may be to change existing management or budget priorities, not necessarily increase total spending.

Furthermore, the information from Reg Flex analyses may not provide a complete picture because the inventory would not include the cumulative impacts of minor regulations. An EPA study found that many regulations that are individually judged as not significant can still overburden small governments when assessed cumulatively. In 1988, EPA did the Municipal Sector Study to understand better the cumulative effects of 22 of its regulations on small governments. The study showed that when considered collectively, the regulations had a significant adverse effect on these governments. Thus, while better criteria on whether and how agencies should do a Reg Flex analysis may result in improved data availability, these data would cover only those regulations that individually are determined to have a significant impact.

In addition, it is not feasible to develop a retrospective inventory of all existing regulations affecting small government and assess their impacts. But an inventory could be developed for all new regulations. In reviewing efforts of some states to compile inventories of existing state regulations affecting local governments, we found that attempts to identify effects retrospectively were time-consuming and costly. But without such information, the value of a cumulative inventory may not be realized for many years because it would take time for the inventory to show the effects of layers of new regulations.

Conclusions

We believe that Reg Flex has several inherent weaknesses that help explain why federal rule-making agencies are not preparing as many analyses as they might. First, SBA may not be able to monitor compliance with the act because it lacks expertise in small government issues. Second, the act does not provide mechanisms to ensure that federal agencies comply with its provisions. And third, neither the act nor SBA has provided criteria or definitions for determining whether federal rule-making agencies are conducting sufficient analyses of regulations affecting small governments and how such analyses should be done. S. 1758 proposed to improve the act's implementation as it applies to small government; however, it did not address the lack of Reg Flex criteria or enforcement authority. Therefore, it may not have led to reduced regulatory burden on small governments.

We believe that SBA's monitoring role of reviewing and commenting on proposed regulations should be enhanced and that it should develop small government expertise within the Office of the Chief Counsel for Advocacy, which is responsible for monitoring Reg Flex. Also, since OMB already has a role in the regulatory review process, we believe it would be appropriate for OMB to assist SBA in developing criteria for conducting Reg Flex analyses, and to help SBA ensure agency compliance through methods similar to those used for other regulatory activities, such as the Paperwork Reduction Act and E.O. 12291.

Recommendation

We recommend that the SBA Administrator enhance SBA's ability to monitor proposed regulations affecting small governments by developing small government expertise within the Office of the Chief Counsel for Advocacy.

Matter for Congressional Consideration

If the Congress wishes to strengthen the implementation of Reg Flex, it should consider amending the act to require that, in consultation with OMB, SBA develop criteria as to whether and how federal agencies should conduct Reg Flex analyses for small governments. Also, it should consider expanding SBA's existing authority to review and comment on proposed agency regulations affecting small governments. This expansion should direct SBA to work with OMB to ensure agency compliance with the act's provisions.

Agency Comments

As discussed with your office, we did not obtain written comments on this report. We did discuss its contents with SBA and OMB officials and incorporated their comments where appropriate.

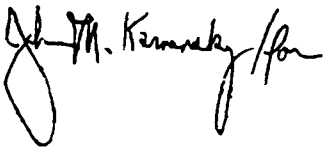
SBA officials agreed that federal rule-making agencies are not giving enough attention to small governments when deciding whether and how to conduct a Reg Flex analysis. They stated, however, that developing criteria with which to ensure that these actions occur may not be practical because each case is unique. They disagreed with our draft report's recommendation that OMB instead of SBA should be designated to administer Reg Flex for small governments. They said that, with additional resources and legislative authority to enforce the act, SBA could achieve the same purpose. OMB officials generally agreed with SBA but believed that the present legislative authority is sufficient to implement Reg Flex and that adequate progress was being made toward that end.

In the absence of review criteria for Reg Flex, we question whether progress toward achieving the act's goals can be properly judged. Moreover, we continue to believe criteria are needed for determining whether and how a Reg Flex analysis should be conducted to ensure the act's implementation. Such criteria exist for other regulatory review efforts and could be developed for Reg Flex as well. We also believe that, if SBA is to continue administering Reg Flex, including developing and ensuring compliance with the needed review criteria, its monitoring role should be enhanced and its Office of the Chief Counsel for Advocacy should develop small government expertise. We believe OMB should assist SBA, in a consultative role, in developing the review criteria and ensuring agency compliance because of its experience in performing these functions for the Paperwork Reduction Act and E.O. 12291.

In subsequent discussions, both SBA and OMB officials agreed that such a collaborative approach could enhance implementation of the act. We revised our recommendation and matter for congressional consideration accordingly.

Copies of this report will be sent to appropriate congressional committees and subcommittees, the Director of OMB, and the Administrator of SBA. We will make copies of this report available to other interested parties on request. If you or your staff have any questions about this report, please call me on (202) 275-1655. Other major contributors are listed in appendix III.

Sincerely yours,



Linda G. Morra
Director, Human Services Policy
and Management Issues

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Abbreviations

APA	Administrative Procedure Act
DOT	Department of Transportation
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
FLSA	Fair Labor Standards Act
NATaT	National Association of Towns and Townships
OMB	Office of Management and Budget
SBA	Small Business Administration

The Purpose of Reg Flex, How It Is Intended to Work, and Its Relationship to Other Regulatory Review Rules

Purpose of Reg Flex

The purpose of the Regulatory Flexibility Act of 1980 is to encourage federal agencies to use innovative administrative procedures to tailor regulations to the size and resources of those who will be affected by them. Its objective is to minimize regulatory burdens on small businesses, nonprofit enterprises, and governments, when size and burden are inversely proportional. An EPA study estimated that the smallest governments, communities with populations under 2,500, experience the greatest costs to comply with environmental regulations. To minimize burden, Reg Flex requires federal agencies, when issuing regulations that affect small entities, to consider alternative regulatory approaches (such as less frequent reporting) that would minimize any significant economic impact of the proposed rule on small entities.

How Reg Flex Is Intended to Work

The act requires federal agencies to carry out a "regulatory flexibility analysis" when proposed regulations have a significant economic impact on a substantial number of small entities. The act requires two Reg Flex analyses for each proposed rule. The initial Reg Flex analysis includes a description of why the proposed rule is needed, an estimate (where feasible) of the number of small entities that will be affected, and the anticipated burden of the proposed rule. As part of this analysis, agencies must consider regulatory alternatives to lessen the impact of proposed regulations while still meeting regulatory objectives. The final analysis is to consider issues raised by public comments and describe the rationale for each regulatory alternative accepted or rejected. For example, when EPA developed national drinking water standards in 1989, its initial analysis assessed the costs state and local governments would incur to monitor and report on the amounts of bacteria in small water systems. Based on this assessment, EPA's final rule did not increase the frequency of sanitary surveys for small water systems as it did for large systems.

SBA's Role

SBA monitors federal agencies' compliance with the act, including its applicability to small governments. The act directs agencies to provide SBA copies of their initial analyses or certifications of their conclusions that an analysis is not required. SBA reviews 50 to 100 Reg Flex analyses a year, and it has the authority to comment on their contents. It also submits an annual report with its views on agency compliance to the President and selected congressional committees. By requiring SBA to monitor compliance with the act, Reg Flex implicitly gives SBA the authority and discretion to issue guidelines on determining when a Reg

Flex analysis is required. However, the act does not grant SBA the authority to ensure agencies' compliance with act provisions.

OMB's Role

OMB generally oversees the implementation of a number of regulatory relief initiatives. Since the passage of Reg Flex in 1980, SBA and OMB have coordinated the act's implementation with these other initiatives. OMB has attempted to incorporate Reg Flex into executive orders affecting the rule-making process. For example, E.O. 12291 requires agencies to prepare regulatory impact analyses for major rules that have an effect on the economy of $100 million or more. This order notes that such analyses may be combined with any analysis called for by Reg Flex. Further, the order requires agencies to prepare a semiannual agenda of rules that each agency is developing. Again, the order refers to a similar requirement in Reg Flex and provides for combining the two activities.

Relationship to Other Regulatory Review Rules

Reg Flex is part of a larger federal effort to minimize the burden of federal regulations. A complex federal rule-making and regulatory review process has evolved through various acts and executive orders. Reg Flex is an extension of the general rule-making process established by the Administrative Procedure Act (APA), which federal rule-making agencies must follow. For example, the analyses required by Reg Flex apply to the same regulations covered by APA. The preparation of the initial and final analyses occurs as part of the rule-making process as defined by APA. Federal rule-making agencies must comply with a number of policies when developing new regulations, and these policies bear some relationship to each other. The following is a summary of the key rule-making policies.

Statutory Requirements

Administrative Procedure Act

APA, which was passed in 1946, serves as the broad framework for the regulatory rule-making process. It establishes agency accountability by spelling out minimum agency responsibilities for formal and informal rulemaking and adjudications. APA is intended to improve policy formulation by promoting public participation and comment and provide a forum to combat undesirable government rules. The Administrative Conference of the United States, a federal agency responsible for

advising federal agencies in developing administrative procedures, monitors the implementation of APA as amended.

Regulatory Flexibility Act of 1980	Reg Flex charges federal regulators with anticipating, examining, and justifying the impact of proposed regulations on small businesses, nonprofit organizations, and small governments. SBA is charged with monitoring its implementation.
Paperwork Reduction Act of 1980	The Paperwork Reduction Act was established to minimize the federal paperwork burden and costs while maximizing the usefulness of information collected by the federal government. The act seeks to coordinate the process of federal data collection through OMB's Office of Information and Regulatory Affairs, which the act established. Federal agencies' data collection activities are reviewed by this office to ensure that data collection is not duplicated elsewhere, and the benefits of the data exceed the costs of collection.

Administrative Requirements

Executive branch agencies have to abide by various executive orders that govern the regulatory review process. OMB is responsible for overseeing the implementation of these orders. The principal executive orders include the following.

E.O. 12291	Requires federal agencies to carry out cost-benefit analyses of all major regulatory actions and publish an agenda of their regulatory actions twice a year. An agency must prepare an analysis if the proposed regulation has an annual national effect of over $100 million or if it has a significant effect on major sectors of the economy, such as consumers or federal, state, or local governments.
E.O. 12498	Requires federal agencies to annually publish a regulatory program identifying all major regulatory agencies' proposed regulatory policies along with a summary of specific regulatory actions under way.
E.O. 12612	Directs federal agencies to assess the implications that their proposed regulations could have on the policies and authority of states and localities, and justify the necessity for such actions. The order encourages agencies to have greater consultation with states, including more state involvement in the formulation of national objectives, and refrain from developing regulations that unnecessarily preempt state authority.

Relationship of Reg Flex and E.O. 12291

Because the requirements for whether and how to prepare a regulatory impact analysis are more explicit in E.O. 12291 than Reg Flex, agencies generally prepare a Reg Flex analysis only when required to prepare an E.O. 12291 analysis.[1] When Reg Flex and E.O. 12291 require agencies to carry out an analysis, Reg Flex allows agencies to include their Reg Flex analyses as part of other analyses.

The two analyses, however, differ. E.O. 12291 requires a formal regulatory impact analysis of all "major" regulations and emphasizes cost-benefit analysis; Reg Flex does not. The quantitative analytical requirements of E.O. 12291, however, can be used to support the impact assessments needed under Reg Flex since they are often prepared jointly.

[1]Paul R. Verkuil, "Critical Guide to the Regulatory Flexibility Act," Duke Law Journal, Vol. 1982 (Apr.), No.2, pp. 253-55.

Scope and Methodology

Identifying Implementation Problems

To determine if federal agencies were doing Reg Flex analyses in appropriate cases, and to identify problems with implementing the act, we examined regulatory actions during an 18-month period. We chose six actions taken by four federal rule-making agencies—EPA, Labor, FCC, and DOT—that were likely to have significance for small governments. We assessed how these agencies implemented Reg Flex, prepared their analyses, and discussed with agency officials the problems they have had in carrying out the act.

Selection of Federal Regulations for Review

For the 18-month period of April 1988 through September 1989, OMB's Unified Agenda of Federal Regulations identified 12,207 regulatory actions by federal rule-making agencies.[1] Of these, 336 regulatory actions affected small governments. We used two criteria to select regulations for our review:

- regulations from those federal rule-making agencies that publish the greatest number of regulations affecting small governments and/or
- regulations where there was controversy about their effects on small governments.

Of the 336 regulatory actions affecting small governments during the 18-month period, the Agenda identified 46 as completed actions. Over half these actions occurred in four agencies. We used these, as well as the hearing record and interviews with interest groups and federal agency officials, as the basis for selecting the four agencies and six regulations included in our review (see table II.1).

These six regulations were not necessarily the most important affecting small governments during that time frame, but they were good case studies of how rule-making agencies implemented Reg Flex. For the six regulations, we reviewed (1) whether and how the agencies prepared their Reg Flex analyses, (2) what types of data were available, and (3) what data analyses agencies used to prepare the initial and final Reg Flex analyses.

[1]Reg Flex, E.O. 12291, and the Office of Federal Procurement Policy Act Amendments of 1988 require agencies to publish semiannual reports on regulatory activity. Federal rule-making agencies have chosen OMB to publish their regulatory agendas. As a result, OMB semiannually prepares the Unified Agenda of Federal Regulations. Beginning in October 1988, the agenda identifies all actions that affected small governments.

Since we were only trying to understand the processes and problems the agencies were having with Reg Flex, we did not attempt to assess federal agencies' compliance with specific provisions of the act. Nor did we attempt to assess the reasonableness of their conclusions concerning the need for, or adequacy of, their regulatory flexibility analyses in specific cases.

Table II.1: Regulations Included in GAO Review

Agency	Regulation	Purpose	Analysis conducted
EPA			
Office of Drinking Water	National Primary Drinking Water Standards—Total Coliform Bacteria (54 Fed. Reg. 27544) 1989	Develops maximum contaminant levels under the Safe Drinking Water Act	Yes, but impact judged not significant
Underground Storage Tanks	Financial Responsibility Requirements (53 Fed. Reg. 43322) 1988	Requires financial responsibility for petroleum releases from underground storage tanks	No, because impact was judged not significant
Labor			
Wage and Hour Division	FLSA (52 Fed. Reg. 2012) 1987	Applies FLSA to state and local employees	Yes, significant, but Labor did not develop alternatives
OSHA[a] jointly with EPA	Hazardous Waste Operations and Emergency Response (54 Fed. Reg. 9294) 1989	Regulates safety and health of employees in clean-up, storage, disposal, and emergency responses to hazardous operations	No, because impact was judged not significant
DOT			
UMTA[b]	Charter Bus Services Amendment (53 Fed. Reg. 53348) 1988	Provides additional exemptions on the use of UMTA-financed equipment for charter bus services	No, because impact was judged not significant
FCC			
Private Radio Bureau	Public Safety Radio Services, Assignment of Frequencies (53 Fed. Reg. 1022) 1988	Technical standards for frequency uses under National Plan for Public Safety, directs federal, state, local agencies to develop regional public safety plans	Yes, but impact was judged not significant since localities would be positively affected

[a]Occupational Safety and Health Administration

[b]Urban Mass Transportation Administration

Assessing Data Availability

We assessed the availability of data to help federal agencies in assessing regulatory effects on small governments. To do this, we interviewed officials in the Bureau of the Census, the Department of Agriculture's Economic Research Service, the policy analysis office in the Department of Housing and Urban Development, and the policy or research divisions of the four rule-making agencies we visited.

Assessing the Feasibility of Developing an Inventory

We also assessed the feasibility of developing an inventory of federal laws and regulations affecting small government. To do this, we reviewed similar efforts undertaken by three states—Massachusetts, Pennsylvania, and South Carolina—to inventory state mandates on local governments. We also reviewed an EPA study that assessed the cumulative effects of several of its regulations on small governments and an OMB semiannual agenda of regulations.

We carried out our review from August 1989 through January 1990 in accordance with generally accepted government auditing standards.

Major Contributors to This Report

Human Resources Division, Washington, D.C.	John M. Kamensky, Assistant Director, (202) 275-6169 Richard H. Horte, Evaluator-in-Charge John Vocino, Evaluator
Office of General Counsel, Washington, D.C.	Dayna K. Shah, Assistant General Counsel Damaris Delgado-Vega, Attorney Advisor